Supreme Court, U. S.
FILED
APR 20 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1608

JAMES F. WARDELL,
Petitioner,

VERSUS

THE STATE OF TEXAS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

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TABLE OF CONTENTS

PAGE

OPINION BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

CONSTITUTIONAL AMENDMENTS INVOLVED 3

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 15

1. The decision below is in direct conflict with decisions of United States Courts of Appeal and in conflict with principles established by this Court as to the requirement of the Fourteenth Amendment that evidence of other criminal acts be accompanied with instructions to the jury limiting their use to motive, intent, scheme, opportunity, preparation, plan, knowledge, identity, or absence of mistake or accident 15

2. The decision below raises significant and recurring problems concerning efforts to expand the purposes for which evidence of extraneous offenses may be introduced at trial 20

CONCLUSION 23

CERTIFICATE OF SERVICE follows Petition.

APPENDIX:

Opinion of Texas Court of Criminal Appeals (Delivered Nov. 1, 1978) A-1

Order of Texas Court of Criminal Appeals Denying Motion for Rehearing (Nov. 22, 1978) A-8

Citation for Appearance to Show Cause, issued by District Court of Potter County, Texas (Jan. 9, 1979) A-9

TABLE OF AUTHORITIES

Cases	PAGE
Ernster v. State, 308 S.W.2d 33 (1967)	17
Goodman v. United States, 273 F.2d 853 (8th Cir. 1960)	15, 18
Johnson v. State, 509 S.W.2d 639 (1974)	17
Kirkpatrick v. State, 515 S.W.2d 289 (1974)	15, 16, 17, 20, 21, 22
McCaleb v. Texas, 537 S.W.2d 728 (1976)	15, 20, 21
Morton v. United States, 351 F.2d 457 (5th Cir. 1965)	18
Schack v. State of Florida, 391 F.2d 503 (5th Cir. 1968)	18
Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed. 2d 606 (1967)	15, 17
United States v. Anderson, 509 F.2d 312 (D.C. Cir. 1974)	19
United States v. Bear Runner, 574 F.2d 966 (8th Cir. 1978)	18
United States v. Beathune, 527 F.2d 696 (10th Cir. 1975), cert. den. 425 U.S. 996, 96 S.Ct. 2211, 48 L.Ed. 2d 821 (1976)	19
United States v. Calvert, 523 F.2d 895 (8th Cir. 1975), cert. den. 96 S.Ct. 1106 (1976)	18
United States v. Carleo, 576 F.2d 846 (10th Cir. 1978)	19
United States v. Carter, 433 F.2d 974 (10th Cir. 1970)	19
United States v. Finch, 470 F.2d 1234 (D.C. Cir. 1972)	15, 19
United States v. Gay, 410 F.2d 1036 (D.C. Cir. 1969)	19
United States v. Girder, 454 F.2d 713 (10th Cir. 1972)	19
United States v. Hatcher, 426 F.2d 1086 (5th Cir. 1970	15, 18
United States v. Herbst, 565 F.2d 638 (10th Cir. 1977)	15, 19
United States v. Howard, 504 F.2d 1281 (8th Cir. 1974)	18
United States v. Jones, 476 F.2d 533 (D.C. Cir. 1973)	19
United States v. Jones, 480 F.2d 1081 (5th Cir. 1973)	18

AUTHORITIES CONTINUED	PAGE
Weiss v. United States, 122 F.2d 675 (5th Cir. 1941), cert. den. 314 U.S. 687, 62 S.Ct. 300, 86 L.Ed. 550 (1941)	18
U. S. Constitution	
Amendment VI	3
Amendment XIV	3
Statutes	
28 U.S.C. § 1257(3)	2

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JAMES F. WARDELL,
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THE STATE OF TEXAS,
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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

The Petitioner, James F. Wardell, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Criminal Appeals for the State of Texas entered in this proceeding on November 1, 1978.

OPINION BELOW

The opinion of the Court of Criminal Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the 108th Judicial District Court, Potter County, Texas.

JURISDICTION

The Opinion of the Court of Criminal Appeals for the State of Texas was entered on November 1, 1978. A timely Petition for Rehearing en banc was denied on November 27, 1978 and Judgment thereafter entered. An Application for Extension of Time in which to file a Petition for Writ of Certiorari was filed with this Court on February 1, 1979. The Application for Extension of Time was granted by Justice Powell on February 5, 1979, extending the time within which to file this petition for certiorari to April 21. 1979. This petition for certiorari was filed within that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

1. Whether a State District Court Judge may permit a State prosecuting attorney to introduce evidence of criminal acts extraneous to the act for which the Defendant was indicted without instructing the jury on the limited purposes for which such evidence may be used.

CONSTITUTIONAL AMENDMENTS INVOLVED

Constitution of the United States:

Sixth Amendment. "Jury trial for crimes, and procedural rights.

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district when the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Fourteenth Amendment, Section 1. "Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of officers; Public Debt; and Enforcement.

"All persons born or naturalized in the United States, and subject to jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

In 1971 the Directors of the Amarillo Air Force Base Credit Union were becoming increasingly concerned with several of the Union's largest loans. It was feared that these loans had been allowed to build beyond lawful amounts and that they were not secured with sufficient collateral.

The Directors and Loan Officers of the Credit Union were especially concerned over fifteen (15) separate notes held by the Credit Union on Colonel Robert Wilkinson, Commanding Officer of the Amarillo Air Force Base. These notes totalled $401,511.84. During January and the first weeks of February, 1972, Colonel Wilkinson and the Petitioner Mr. Wardell participated in a series of meetings with members of the Board of Directors for the Credit Union, Mr. Gene Welna the Union's loan manager and Mr. Arward Smith, Assistant Loan Manager, a former member of the Board of Directors and Petitioner's co-defendant below.[1]

As a result of these meetings it was agreed that the Petitioner, Colonel Wilkinson and the Credit Union would enter into a loan assumption agreement. The agreement provided as follows:

"ASSUMPTION AGREEMENT

"Agreement made February 10, 1972, between ROBERT N. WILKINSON, hereinafter called WILKINSON AND JAMES WARDELL, hereinafter called WARDELL:

[1] Arward Smith was found guilty and sentenced to seven years probation on February 10, 1975.

"WHEREAS Wilkinson is presently indebted to the Amarillo Air Force Base Credit Union in the sum of $401,511.84; and,

"WHEREAS Wardell desires to purchase Wilkinson's Credit Union shares pledged against his loan with the Credit Union and 10,000 shares of Amarex Incorporated, also pledged against this loan, and assume the obligations of Wilkinson on his notes;

"NOW, THEREFORE, it is agreed as follows:

"1. *Transfer of Stock.* Simultaneously with the execution of this instrument, Wilkinson will transfer to Wardell 10,000 shares of Amarex Incorporated and all of his shares in the Amarillo Air Force Base Credit Union, being in the sum of $31,044.45.

"2. *Cash Consideration.* In addition to the transfer of the above shares, Wilkinson will also, simultaneously with the execution of this instrument, deliver to Wardell a cashier's check in the amount of $50,000.

"3. *Assumption of Notes.* In consideration of the foregoing, Wardell will assume Wilkinson's obligations on the following notes:

†Note number 083421WI	$21,951.92
†Note number 083422WI	6,745.90
†Note number 083423WI	31,044.79
*Note number 083425WI	23,453.56
†Note number 083427WI	39,421.24
*Note number 083428WI	26,464.51
†Note number 10224-1WI	22,580.00
*Note number 10224-2WI	70,509.80
†Note number 10224-3WI	22,604.55
†Note number 10224-4WI	11,866.83
†Note number 10224-5WI	21,284.57
†Note number 10224-6WI	26,955.28
†Note number 10224-7WI	13,932.16

†Note number 10224-8WI	54,028.00
†Note number 10224-9WI	8,669.07
Total	$401,511.84

Account (Note) 8342-2WI dated February 10, 1972 supersedes Notes indicated by *

Account (Note) 8342-WI dated February 10, 1972 supersedes Account indicated by †

"This assumption will be perfected by a total release of Wilkinson on the above described notes and Wardell will execute, simultaneously with the execution of this instrument, a note or notes payable to the Credit Union in a sum equal to the total of the above described notes. This will be a complete release for Wilkinson on these notes and there will be no recourse by the Credit Union against Wilkinson.

"4. *Additional Security.* In addition to the stock already pledged against the above described notes (being the same stock transferred by Wilkinson to Wardell) Wardell will pledge to the Amarillo Air Force Base Credit Union sufficient shares of International Air, Inc., so that the loan will be sufficiently collateralized in accordance with all regulations for stock loans prescribed by the Securities and Exchange Commission.

"5. *Note Payments.* Wardell agrees to pay the above described indebtedness on a monthly basis commencing July the 1st, 1972. Payments on his note will be in the amount of $5,000.00 per month plus accrued interest for a period of 59 months; on the 60th month, Wardell will pay all of the remaining balance owed on this note plus accrued interest.

"Executed this 10th day of February, 1972."

On February 15, 1972, the Petitioner transferred 900,000 shares of International Airlines, Inc., to the Amarillo

Air Force Base Credit Union to further collateralize the Wilkinson note in accordance with the terms of the assumption agreement.

Thereafter on October 2, 1972, the Petitioner obtained a release from the Credit Union of the Ten Thousand Shares of Amarex, Inc. (State's Exhibit 25), held as collateral for the Wilkinson notes in exchange for fifteen (15) Ten Thousand Dollar Nineteen Corporation Debenture Bonds.

The Directors were also concerned with another large under-collateralized loan in the amount of $160,145.00 made to Mr. Clifford Bobbitt, then Vice President of the Bank of the Southwest located in Amarillo, Texas. As of February, 1972, the note payments were some $1,500.00 in arrears.

Therefore or October 27, 1972 Mr. Bobbitt, the Petitioner, and the Credit Union entered into an assumption agreement (State's Exhibit 22) substantially similar to the February 10th agreement between Colonel Wilkinson, the Petitioner, and the Credit Union. This agreement provided as follows:

"$160,145.00 Amarillo, Texas October 27, 1972

On Demand, I, we, or either of us, the undersigned, promise to pay to the Order of AMARILLO A.F.B. CREDIT UNION at Amarillo, Potter County, Texas, the sum of ONE HUNDRED SIXTY THOUSAND ONE HUNDRED FORTY FIVE AND NO/100 DOLLARS ($160,145.00), with interest thereon from date until maturity at the rate of nine percent (9%) per annum, the interest payable at maturity, both principal and interest payable at Amarillo, Potter County,

Texas, for value received. All past due principal and interest due on this note shall bear interest from maturity thereof until paid, at the rate of ten percent (10%) per annum.

This note is secured by the personal endorsement and guarantee of JAMES F. WARDELL, together with the following collateral and properties owned by James F. Wardell and pledged to the holder of this note as collateral for the prompt and full payment of same, described as follows:

> Twelve (12) Bonds, each in the amount of $10,000.00, issued by The Nineteen Corporation.

* * * * * * *

For valuable consideration, the receipt and sufficiency of which is hereby acknowledged, in hand paid to Amarillo A.F.B. Credit Union by Cliff Bobbitt, also known as Clifford Bobbitt, Amarillo A.F.B. Credit Union does hereby approve the foregoing note and does expressly release and discharge the said Cliff Bobbitt from any and all personal liability on the following notes:

1. Note No. 3973, Account No. 1963-7-1-BO, in the original amount of $99,804.75, dated June 21, 1972, executed by Cliff Bobbitt, payable to Amarillo A.F.B. Credit Union;

2. Note No. 4062, Account No. 19637-3-BO, in the original amount of $60,900.00, dated July 3, 1972, executed by Cliff Bobbitt, payable to Amarillo A.F.B. Credit Union;

But not otherwise.

"This release is expressly limited to the notes described above and Cliff Bobbitt is not released from liability on any other note executed by him and payable to Amarillo A.F.B. Credit Union."

Pursuant to the terms of the assumption agreement and contemporaneous with its execution, Mr. Bobbitt obtained a release of 9,700 shares of Amarex, Inc., which had been supplanted by the twelve (12) $10,000.00 Nineteen Corp. Debenture Bonds (State's Exhibit 37).

In 1972 the May term of the Potter County Grand Jury returned a six (6) count indictment against the Petitioner alleging inter alia that he, as principal, entered into a conspiracy with Arward Smith, Robert Wilkinson and Clifford Bobbitt to steal shares of Amarex, Inc., from the Amarillo Air Force Base Credit Union.

During the February 10th, 1975 pre-trial hearing Lawrence B. Mitchell, then attorney for Petitioner, filed a Motion to Instruct State's Counsel on Extraneous Transactions. This motion provided as follows:

> "Comes Now the Defendant James Wardell and respectfully requests the Court to instruct counsel for the State not to allude to, infer, suggest, hint or otherwise try to get into evidence or before the jury extraneous transactions, if any, or other offense or offenses, if any, of the Defendant, whether filed on or before the Court and Defendant outside the presence and hearing of the jury, to allow the court to pass on the admissibility of said matters before they are heard by the jury."

This motion was subsequently granted by the trial judge.[2]

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[2] "THE COURT: Your Motion to refrain from going into extraneous actions likewise is good, I think, and is granted." (Tr. Vol. 1, pg. 4).

Moreover Mr. Tom Curtis, District Attorney for Potter County, Texas, elected to proceed only on count two of the indictment against the Petitioner. The record below reveals the following exchange between Mr. Curtis, Mr. Mitchell and the trial judge:

"THE COURT: You want to proceed on count two only of your indictment, then, is that correct?

MR. CURTIS: Yes, sir.

MR. MITCHELL: Your Honor, I would like the record to reflect that this election by the District Attorney's office to proceed only on count two is not pursuant to any motion I have filed, but at his own instance.

THE COURT: I don't so understand it. I thought you had moved the Court to require him to elect at this stage of the trial on what count he would proceed.

MR. CURTIS: That was my understanding, too, Your Honor.

MR. MITCHELL: Yes, sir, and I thought it was overruled by the Court.

THE COURT: Well, after I overruled you, then the D.A. voluntarily—Mr. Curtis, the District Attorney, voluntarily acceded to your motion and did elect to go to trial on count two only.

MR. MITCHELL: That is my understanding exactly.

THE COURT: That is the state of the record then . . ." (Tr. Pg. 22)

Thereafter, just prior to receiving the Petitioner's plea and after count two of the indictment had been read to the Petitioner, the court made the following statement:

"I will instruct this jury that it is the only count [count two] they can consider and if it creeps into here that there is more than one count in the indictment, I will withdraw it from the jury's consideration."

The District Attorney himself summed up the results of the motion to instruct on extraneous transactions and the District Attorney's election to prosecute only count two of the indictment when he stated, "that on trial in this case is the indictment in cause Number 15921 and only count two of that indictment is on trial in this case." (Tr. 854)

During trial[3] the prosecution introduced a voluminous amount of evidence relating to the October 2 and October 27, 1972 transactions. Upon the introduction of evidence relating to the October 2nd and October 27th transactions, Petitioner's counsel objected as follows:

"MR. MITCHELL: Your Honor, . . . I would ask leave of the court to be allowed to make one objection each time they begin to go into areas that I consider to be extraneous offenses and then not to be required to object thereafter. That would allow the state to proceed with its case but allow me to point out to another court, if it should ever have occasion to look at this—

MR. CURTIS: Why don't we let him have a running objection without even— since he is doing that— when we go into our offer of the evidence to the transaction that took place on or about October

[3] Petitioner's trial was one of the most lengthy ever conducted in the history of Texas lasting from February 10, 1975 to March 6, 1975. The transcript of the trial proceedings consist of slightly more than three thousand pages.

2nd or on or about October 27 and that will take care of that bill.

MR. MITCHELL: Alright, in that case— with that in mind that both offenses are claimed by the Defendant of October 2nd and October 27th, the alleged thefts of Amarex stock on those dates are extraneous offenses to the dates charged in the indictment, then if that is agreed by Mr. Curtis—

MR. CURTIS: We are not agreeing—

MR. MITCHELL: No, but it is agreed that that is my point.

MR. CURTIS: Yes.

MR. MITCHELL: Then in that case, it would not be necessary for me to make my objection because those are the two transactions that I expect the state to introduce which I consider to be extraneous.

THE COURT: Alright. Mr. Mitchell, Mr. Baum and Mr. Hubbert, I will overrule your objection as stated and will give you a continuous, running bill of exceptions on it as the proof is offered without the necessity of your making any further objections.

MR. MITCHELL: This goes to the October 2nd and October 27th transactions.

THE COURT: So understood, yes, sir." (Tr. 858)

At the close of trial Petitioner's attorneys filed an objection with the court alleging:

"I.

"The court has failed to give a charge limiting the use of alleged extraneous offenses occurring on October 2, 1972, to motive, system or intent.

"II.

"The court has failed to give a charge limiting the use of alleged extraneous offenses occurring on October 27, 1972 to motive, system or intent."

The trial judge overruled this objection on March 3, 1975. Thus the trial court's charge to the jury included instructions which specifically stated that the evidence submitted with respect to the October 2nd and October 27th transactions could be used in determining Plaintiff's guilt for the February 10, 1972 transaction, the only date alleged in count two of the indictment. The instructions provided in relevant part as follows:

". . . if you believe from the evidence beyond a reasonable doubt that the Defendant James Wardell, acting with Arward Smith or Robert N. Wilkinson as a principal, as that term is defined herein . . . by concealing that James Wardell was to assume, did assume, and had assumed in writing, on or about October 27, 1972, the indebtedness of Clifford Bobbitt, theretofore existing by Bobbitt to the Amarillo Air Force Base Credit Union in the approximate amount of $160,145.00, if done or by concealing that on or about October 27, 1972 the said Clifford Bobbitt was to be released and was released in writing from said indebtedness to the Amarillo Air Force Base Credit Union, if done, or by concealing that approximately 9600 or 9700 shares of Amarex, Inc., stock certificates had been removed from possession of the Amarillo Air Force Base Credit Union and handed over by Arward Smith to Robert H. Wilkinson or James Wardell on or about October 2, 1972, if done or by representing that said exchange would improve the collateral position of Amarillo Air Force Base Credit Union if made, or by any single instance or any combination of the

aforementioned pre-text, misrepresentations, or concealments if any . . . then you will find the Defendant guilty of such as charged in the indictment." [Charge of the court, Filed March 4, 1974, Judge W. J. Oxford]

On appeal, the Texas Court of Criminal Appeals, citing authority, stated *"where there is no election* as to which transaction the state relies upon, jeopardy attaches to all transactions upon which proof is presented." (Emphasis ours, Ct. of Cr. App. Opinion, pg. 2).

Because "jeopardy attached to all three transactions" the court reasoned that Petitioner's rights had been properly protected and therefore no limiting instructions were required. Thus the court concluded "we are convinced that the use of the 'on or about' rule to allow proof of several transactions, especially in a white-collar scheme, is a common sense application of pleading rules. . . ."

REASONS FOR GRANTING THE WRIT

1.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH DECISIONS OF UNITED STATES COURTS OF APPEAL AND IN CONFLICT WITH PRINCIPLES ESTABLISHED BY THIS COURT AS TO THE REQUIREMENT OF THE FOURTEENTH AMENDMENT THAT EVIDENCE OF OTHER CRIMINAL ACTS BE ACCOMPANIED WITH INSTRUCTIONS TO THE JURY LIMITING THEIR USE TO MOTIVE, INTENT, SCHEME, OPPORTUNITY, PREPARATION, PLAN, KNOWLEDGE, IDENTITY, OR ABSENCE OF MISTAKE OR ACCIDENT.

As a matter of constitutional protection in State and Federal criminal prosecutions, evidence of other crimes may be submitted to the jury only if such evidence is accompanied with instructions limiting their use to determining motive, intent, scheme, opportunity, preparation, plan, knowledge, identity, or absence of mistake or accident. *Spencer* v. *Texas*, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967); *United States* v. *Herbst*, 565 F.2d 638, (10th Cir. 1977); *United States* v. *Finch*, 470 F.2d 1234 (D.C. Cir. 1972); *United States* v. *Hatcher*, 426 F.2d 1086 (5th Cir. 1970); *Goodman* v. *United States*, 273 F.2d 853 (8th Cir. 1960). Texas no longer follows this rule. *Kirkpatrick* v. *State*, 515 S.W.2d 289 (1974); *McCaleb* v. *Texas*, 537 S.W.2d 728 (1976).

The Texas Court of Criminal Appeals holding in Petitioner's appeal below was bottomed on the court's previous decision in *Kirkpatrick;* a decision itself unconstitutional as it is inconsistent with the Sixth and Fourteenth

Amendments Due Process guarantees as interpreted by this Court and the Courts of Appeal in Federal and State court criminal prosecutions.

In *Kirkpatrick* the court determined that the defendant was not entitled to a limiting charge because (1) the defendant not only testified himself as to the details of the extraneous offenses, but had been first to introduce evidence relating to several of the alleged offenses; (2) the indictment did not allege a *particular transaction* with a *particular individual*,[4] and (3) the defendant had been charged with embezzlement of public funds which necessarily implied a continuing series of transactions.

Thus it is clear that the *Kirkpatrick* decision is not only unconstitutional, it is easily distinguishable from the case here on several grounds. The record below clearly shows that the District Attorney specifically elected to proceed on count two of the indictment. Count two of the indictment relates *solely* to the February 10, 1972 transaction *specifically* involving Arward Smith, members of the Board of Directors of the Amarillo Air Force Base Credit Union, Col. Wilkinson and the Petitioner. Therefore the indictment here did allege a particular transaction and did designate particular individuals. Moreover the trial judge sustained a motion *in limine* prohibiting the District Attorney from introducing evidence of extraneous offenses and assured Petitioner's counsel below that if such evidence did come out during the course of the trial he would admonish the jury to ignore it.

[4] Thus the Court reasoned that evidence of extraneous offenses was admissible because the State could therefore pursue a circumstantially proven case.

In addition the Petitioner did not testify to the details of any extraneous transaction subsequent to their introduction by the State nor did he initially introduce evidence relating to any extraneous transactions. The *Kirkpatrick* decision simply does not apply to the matter before the Court here.[5]

As Judge Roberts and Judge Odom indicated, the *Kirkpatrick* decision is in direct conflict with holdings of numerous decisions of that court.[6]

In *Spencer* v. *Texas* (supra), this Court recognized the proper procedure to follow in mitigating the prejudicial effects of evidence of extraneous offenses; that is, a court should issue instructions to the jury limiting the jury's use of such evidence to its proper function. Although this Court went on to hold that the Due Process Clause of the Fourteenth Amendment was not controvened by the introduction of prejudicial evidence of prior convictions, this determination was based on the fact that in the trial below limiting instructions were given and the introduction of such evidence had met a valid State purpose, to-wit: enforcement of the Texas habitual-offender

[5] Judge Roberts and Judge Odom filed bitter dissents to the majority's opinion: Judge Roberts correctly pointed out that, "the majority's action in overruling the Appellants . . . grounds of error *has no support in law* and is, in fact, contrary to holdings of numerous decisions of this Court. . . ."

"Under many holdings of our Court, that denial [of limiting instructions] was reversible error. The majority now hold that the evidence was not only admissible (a proposition with which I agree), but that no instructions need be given to the jury regarding it. I cannot agree with this contention."

[6] *Johnson* v. *State*, 509 S.W.2d 639 (1974); *Ernster* v. *State*, 308 S.W.2d 33 (1967), and the cases there cited.

statute. Here there were no limiting instructions given to the jury nor was the habitual-offender statute involved.

The Fifth Circuit Court of Appeals since its decision in *Weiss* v. *United States*, 122 F.2d 675 (5th Cir. 1941), *cert. den.* 314 U.S. 687, 62 S.Ct. 300, 86 L.Ed. 550 (1941), has recognized the general rule that evidence of extraneous offenses connected with the one on trial is admissible but subject to a number of exceptions. Thus the Fifth Circuit has consistently held that evidence of extraneous offenses must be coupled with a court's charge limiting the purposes for which such evidence may be received. *United States* v. *Jones*, 480 F.2d 1081 (5th Cir. 1973); *United States* v. *Hatcher* (supra), *Schack* v. *State of Florida*, 391 F.2d 503 (5th Cir. 1968), and *Morton* v. *United States*, 351 F.2d 457 (5th Cir. 1965).

The Eighth Circuit, following the same approach taken by the Fifth Circuit, has interpreted the requirements of the Sixth and Fourteenth Amendments as these amendments relate to instructions limiting the use of evidence of extraneous offenses. Thus in *Goodman* v. *United States* (supra), the Court held that if evidence of extraneous offenses is admitted, "the court should give a limiting instruction, informing the jury of the narrow purposes for which it has been admitted." See also *United States* v. *Bear Runner*, 574 F.2d 966 (8th Cir. 1978); *United States* v. *Calvert*, 523 F.2d 895 (8th Cir. 1975), *cert. den.* 96 S.Ct. 1106 (1976); *United States* v. *Howard*, 504 F.2d 1281 (8th Cir. 1974).

The Tenth Circuit Court of Appeals has repeatedly held that "evidence of criminal activity other than that

specifically charged in an indictment is not admissible unless it establishes a course of conduct, scheme, design, or intent. *United States* v. *Herbst* (supra); *United States* v. *Beathune*, 527 F.2d 696 (10th Cir. 1975), *cert. den.* 425 U.S. 996, 96 S.Ct. 2211, 48 L.Ed.2d 821 (1976). However such evidence has been held not in violation of the Sixth Amendment or the due process clause of the Fourteenth Amendment if the jury has been properly instructed as to the limited purposes for which such evidence may be received. *United States* v. *Carleo*, 576 F.2d 846 (10th Cir. 1978); *United States* v. *Herbst* (supra); *United States* v. *Girder*, 454 F.2d 713 (10th Cir. 1972) and *United States* v. *Carter*, 433 F.2d 974 (10th Cir. 1970).

The Court of Appeals for the District of Columbia in *United States* v. *Finch* (supra), held that where evidence of extraneous offenses is deemed admissible the trial court is "under a *duty* to instruct the jury on the limited purpose for which the evidence was to be considered" (emphasis ours). See also *United States* v. *Anderson*, 509 F.2d 312 (D.C. Cir. 1974); *United States* v. *Jones*, 476 F.2d 533 (D.C. Cir. 1973); and *United States* v. *Gay*, 410 F.2d 1036 (D.C. Cir. 1969).

This conflict between the Texas Court of Criminal Appeals and United States Court of Appeals over the requirements of the Sixth and Fourteenth Amendments as these requirements relate to the admissibility of evidence of extraneous offenses justify the grant of Certiorari to review the judgment below.

2.

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING EFFORTS TO EXPAND THE PURPOSES FOR WHICH EVIDENCE OF EXTRANEOUS OFFENSES MAY BE INTRODUCED AT TRIAL.

The Opinion of the Texas Court of Criminal Appeals in this case represents a significant and insidious departure from the Sixth Amendment and Fourteenth Amendment Due Process requirement that evidence of extraneous offenses be accompanied with limiting instructions designed to assure that such evidence be admitted only for proper purposes. This departure was heralded by the Court of Criminal Appeals decision in *Kirkpatrick*. The *Kirkpatrick* rule was subsequently extended and further legitimized in *McCaleb* v. *State*, 537 S.W.2d 728 (1976). These decisions and the decision below represent a subtle but profound erosion of established legal and constitutional principles relating to the admissibility of extraneous offenses.

Since this Court has not had occasion to address itself to this matter specifically and in detail, there are compelling reasons why some definitive guidelines in the application of Sixth and Fourteenth Amendment requirements to the need that evidence of extraneous offenses be accompanied with appropriate limiting instructions.

Efforts to introduce evidence of extraneous offenses in order to prove the guilt of the Defendant for the act charged is occurring with greater frequency in the State of Texas, and both litigants and trial courts urgently need the assistance of this Court in understanding the relationship between the Sixth and Fourteenth Amendments and

the question presented here. Among the unanswered questions thus posed are:

(1) If a Defendant has been charged with theft from, or bribery, or embezzlement of a public official and a series of transactions are involved, may the prosecution introduce evidence relating to all the transactions even though the indictment is based only on one transaction; on the theory that evidence of the ancillary transactions is merely circumstantial and therefore admissible? In *Kirkpatrick* v. *State* (supra), the Texas Court of Criminal Appeals held that the many transactions involved there in which the Defendant failed to account for public funds collected were all a part of the State's main case and therefore constituted circumstances in the chain of events by which the State showed the ultimate conversion of public funds to the Defendant's own use and benefit. On the basis of this analysis, the court characterized the evidence of ancillary offenses as circumstantial evidence and concluded that the court below had not erred in refusing to give the limited instructions requested.

(2) Is it harmless error for a trial judge to admit evidence of extraneous offenses without accompanying such evidence with instructions limiting the purposes for which the jury may use such evidence where the evidence of the extraneous offenses is as strong as the evidence relating to the transaction for which the Defendant has been indicted? In *McCaleb* v. *State* (supra), the Texas Court of Criminal Appeals held that the trial court's failure to give limiting instructions was *harmless error* since the evidence relating to the extraneous offenses could not, in the opinion of the Court, have been used for any other purpose.

(3) If an indictment names specific individuals and alleges a criminal transaction occurred on a specific date, may prosecuting officials nonetheless introduce evidence of extraneous offenses occurring any time within the period of the statute of limitations anterior to the date the indictment was issued for the purpose of establishing guilt for the transaction stated in the indictment? The Opinion of the Texas Court of Criminal Appeals issued in the case here held that no limiting instructions were required because: (1) all three transactions fell within the period of limitations determined from the date the indictment was returned and could therefore be properly proved against the Petitioner; and (2) the court was convinced that the use of the "on or about" rule to allow proof of several transactions, especially in a white-collar scheme, was a "common sense application of pleading rules . . . and does not work an improper hardship upon a defendant."

Finally, the correctness of the decision below, even assuming the validity of the *Kirkpatrick* decision, is open to serious question. The record shows quite plainly that the District Attorney elected to proceed only on one count of the indictment and that the trial judge specifically stated that if evidence came before the jury relating to any other transaction listed in the count of the indictment he would carefully instruct the jury to ignore the remark. Indeed the trial court granted Petitioner's Motion in Limine in this respect. The refusal of the Texas Court of Criminal Appeals to respect those facts and the action of that court in refusing to follow its own clear precedent authority cannot be justified.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Texas Court of Criminal Appeals.

Respectfully submitted,

STEPHEN JONES
P. O. Box 3339
Enid, Oklahoma 73701

Attorney for Petitioner

April 15, 1979

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April, 1979, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to the following:

Tom Curtis, Esq.
Potter County District Attorney
Potter County Court House
Amarillo, Texas 79101

Counsel for Respondent

Attorney General of Texas
State Capitol
Austin, Texas 78711

I further certify that all parties required to be served have been served.

Stephen Jones

APPENDIX

APPENDIX

[Texas Court of Criminal Appeals]

JAMES WARDELL, Appellant

NO. 55,204, v. — Appeal from Potter County

THE STATE OF TEXAS, Appellee

OPINION

James Wardell appeals his conviction for theft. The jury assessed punishment at seven and one-half years.

Appellant argues that there was no limiting instruction given on the use of two extraneous offenses, there was a fatal variance between the proof and indictment, the charge's definition of "false pretext" was erroneous, the district attorney made several improper jury arguments and asked an improper question, business records were introduced without a proper predicate and his motion for severance was improperly denied. The sufficiency of the evidence is not challenged. We overrule the contentions and affirm.

Appellant and his co-defendant Arward Smith were charged with theft arising out of dealings with the Amarillo Air Force Base Credit Union. The State's evidence proved that appellant had assumed a debt of $401,000 for Robert Wilkinson on February 10, 1972. Appellant used International Airlines and Water Wagon, Incorporated stock as collateral. On October 2, 1972, appellant substituted Nineteen Corporation bonds for Amarex stock and other collateral which secured this debt. On October 27, 1972, appellant assumed notes for Clifford Bobbitt and again removed Amarex stock collateral and substituted Nineteen Corporation bonds. The evidence indicated that the stocks and bonds substituted by appellant were worthless.

Wardell did not take the stand. His defense consisted of evidence which tended to show the stocks and bonds he used had some value.

Appellant contends the trial court erred in failing to give a limiting instruction to the jury concerning the use of two extraneous offenses. The indictment contends that the offense occurred "on or about" February 10, 1972. Appellant contends that the transactions on October 2 and October 27 were, therefore, extraneous offenses.

The State is not bound by the date alleged in an indictment but may rely upon any date within the period of limitations. Ellis v. State, 318 S.W.2d 655 (Tex.Cr.App. 1958). Where there is no election as to which transaction the State relies upon, jeopardy attaches to all transactions upon which proof is presented. Marshall v. State, 432 S.W. 2d 918 (Tex.Cr.App. 1968); Ellis v. State, supra.

In Kirkpatrick v. State, 515 S.W.2d 289 (Tex.Cr.App. 1974), an embezzlement case involving numerous transactions, we dealt with an identical argument. We held that since all transactions were properly part of the State's proof, they were not extraneous offenses and no limiting instruction was required. In the instant case, all three transactions fell within the period of limitations and could properly be proved against appellant. No limiting instruction was required.

Appellant does not really challenge the *Kirkpatrick* rule but rather argues that the State abused its prerogative in the instant case. We perceive no basis to find that the rule worked a greater hardship on appellant than on Kirkpatrick. Appellant does not contend that he did not have notice of what the State would prove and, since jeopardy attached to all three transactions, appellant's rights were properly protected. We are convinced that the use of the "on or about" rule to allow proof of several transactions, especially in a white-collar scheme, is a common sense application of pleading rules to a complicated fact situation and does not work an improper hardship upon a defendant.

Appellant next contends there is a fatal variance between the indictment and the proof. The indictment alleges, in part, that the theft involved a "quantity of Amarex, Inc. shares being unknown to the Grand Jury."

Before a grand jury can properly allege that information is unknown to them, they must exercise reasonable diligence to obtain the information. Jordan v. State, 520 S.W.2d 388 (Tex.Cr.App. 1975); Payne v. State, 487 S.W.2d 71 (Tex.Cr.App. 1972). Appellant contends the record does not indicate this necessary reasonable diligence.

The State called Fred Salamy, a member of the grand jury that indicted appellant. Salamy testified that the grand jury heard from two witnesses that were in a position to know about the records that would show the exact number of Amarex shares involved. These witnesses indicated there were no formal records and that the informal records were unreliable. Appellant stresses that the grand jury did not attempt to subpoena records or receipt books from the credit union. The information the grand jury received indicated that the only records kept were informal and unreliable. Under these circumstances, the jury was authorized to believe that the grand jury exercised proper diligence; there was no variance between the proof and indictment.

Complaint is next made of the definition of false pretext in the charge. The charge contains the following:

> "It also means failing to correct a false impression of fact that is likely to effect the judgment of another in the transaction which impression of fact the person charged previously created or confirmed by words or conduct and which he did not then or later believe to be true."

Appellant argues that the final phrase "or later believed to to be true" indicates that the false pretext need not be the inducing cause for the party to surrender the property.

The charge later instructs the jury that a taking is wrongful if obtained by false pretext. Also, in applying the law to the facts the charge clearly indicates that the false pretext, if any, must be the inducing cause of the property transfer.

Appellant next complains of an improper jury argument by the prosecutor. During the cross-examination of co-defendant Smith, the prosecutor asked Smith if he ever had asked Wardell for a $4,000 loan. Smith replied in the negative. Smith's attorney, referring to this, argued that the question was baseless and that it was a "cheap shot, smelly" and constituted a trial by "innuendos and insinuations." The prosecutor responded, "Can't you conclude from all the evidence in this case, that I probably had a good reason to ask him that question?"

Jury arguments, which would otherwise be improper, are proper when they are a legitimate response to the invitation of opposing counsel. Lapp v. State, 519 S.W.2d 443 (Tex.Cr.App. 1975); Sennette v. State, 481 S.W.2d 827 (Tex.Cr.App. 1972). The prosecuting attorney's remarks were a proper response to the argument of the defense attorney.

Complaint is made of a question asked by the prosecutor. While cross-examining co-defendant Smith, the prosecutor stated, "You felt that vise closing around you and your fellow thief. . . ." The trial judge sustained the objection and instructed the jury to disregard the statement. Appellant contends that this question was so prejudicial that an instruction to disregard was insufficient to cure the error.

Normally, error in asking an improper question can be cured by an instruction to disregard. Mitchell v. State, 455

S.W.2d 266 (Tex.Cr.App. 1970); White v. State, 444 S.W.2d 921 (Tex.Cr.App. 1969). Only in extreme cases, where the remark is clearly calculated to deny a defendant a fair trial, will reversal be required. For example, in Boyde v. State, 513 S.W.2d 588 (Tex.Cr.App. 1974), upon which appellant relies, the jury was aware that the defendant had made inadmissible comments to the arresting officer. The officer was asked if he had any doubt of the defendant's guilt. After this question was ruled improper, the prosecutor asked essentially the same question. The obvious and repeated misconduct of the prosecutor in *Boyde* necessitated reversal.

The question asked in the instant case was considerably less egregious than in the *Boyde* case. The question was not repeated. We conclude the instruction to disregard was sufficient to cure the error.

Appellant next complains of two interrelated jury arguments. At the punishment phase, the prosecutor argued:

> "Not one victim over four thousand, thousands and thousands of dollars, I guess the largest theft from a standpoint of numbers of victims and numbers of dollars that I can recall. . . ."

Appellant's objection was sustained and the jury was instructed to disregard the argument. The prosecutor then continued:

> "It may well be that there have been larger ones right here."

Appellant's objection was overruled.

We have previously held that a prosecutor may make a reasonable deduction from the evidence and conclude a case is the worst he has ever seen. Perez v. State, 466 S.W. 2d 283 (Tex.Cr.App. 1971); Farmer v. State, 255 S.W.2d 864 (Tex.Cr.App. 1953), and cases cited therein. Although

in many of our previous cases there was an instruction to disregard given, the language in prior cases has condoned this type of argument. Farmer v. State, supra. Brown v. State, 51 S.W.2d 616 (Tex.Cr.App. 1932).

In the instant case, the record reflects a theft of several hundred thousand dollars from a credit union. It was obvious to the jury that this was a larger than normal theft. We conclude that the argument was not improper. If it should be error, the instruction to disregard was more than sufficient to fully protect appellant's right to a fair trial.

Appellant next complains that two documents were improperly admitted into evidence as business records. Article 3737e, V.A.C.A. Jane Rouk, an employee of the credit union, had run a credit check on appellant by telephoning a local credit bureau. The credit bureau gave Rouk information on several credit cards and open accounts of appellant's. The credit bureau also told Rouk of four lawsuits in which appellant was a defendant, one of which he lost and three which were apparently still pending. Rouk took two pages of notes on this information. These notes were admitted as business records.

Article 3737e, supra, sets forth, in detail, the predicate which must be laid for admission of business records. Article 3737e provides that a record is admissible if:

"(a) It was made in the regular course of business;

"(b) It was the regular course of that business for an employee or representative of such business with personal knowledge of such act, event or condition to make such memorandum or record or to transmit information thereof to be included in such memorandum or record;

"(c) It was made at or near the time of the act, event or condition or reasonably soon thereafter."

Rouk testified that all three requirements were met.

Despite Rouk's testimony, these records are not admissible. Assuming Rouk testified in good faith, she apparently thought that the act, event or condition referred to in the prosecutor's questions was the telephone conversation with the credit bureau. The record shows she knew nothing of how the information contained in the notes was obtained or recorded. Double hearsay does not become admissible because an employee took notes of what she heard.

Nonetheless, because we are convinced this evidence was harmless, reversal of the case is not required. The central issue in the case was the value of the stock substituted as collateral by appellant. To a lesser extent, the defense relied upon the lack of diligence of the credit union's board of directors. The "business records" introduced did not directly bear on either of these issues. We also note that neither appellant's attorney nor the prosecutor made mention of these business records or similar evidence in the jury summations.

The record in this case is nearly 6,000 pages long. The State offered abundant proof on each element of the indictment. The improper introduction of hearsay evidence that was relevant only to a side issue did not effect the jury's decision.

Finally, appellant argues that his motion for a severance should have been granted. He contends he was harmed both by the fact that co-defendant Smith had an inconsistent defense and co-defendant Smith was involved in an extraneous offense.

Article 36.09, V.A.C.C.P., provides that a severance must be granted whenever a co-defendant has an admissible prior conviction or a joint trial would be prejudicial. The determination as to whether the joint trial will be prejudicial is made by the trial judge subject to our review under an abuse of discretion standard. Calverley v. State, 511 S.W.2d 60 (Tex.Cr.App. 1974); Bolding v. State, 493 S.W.2d 186 (Tex.Cr.App. 1973).

Co-defendant Smith did not have an admissible prior. The jury was instructed to consider the extraneous offense against Smith only. While the defense tactics varied between Smith and appellant, the development of both defenses before the jury did not prejudice appellant. There was no abuse of discretion in denying the severance.

There is no reversible error. The conviction is affirmed.

Per Curiam

(Delivered November 1, 1978)

By: Panel Three, Fourth Quarter, 1978

Composed Of: Leon Douglas, Judge
Tom G. Davis, Judge
Jim Vollers, Judge

Vollers, J., not participating

CLERK'S OFFICE

COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

I, THOMAS LOWE, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 55,204 styled:

JAMES WARDELL, Appellant

VS.

THE STATE OF TEXAS, Appellee

the judgment of the 108th. Judicial District Court of Potter County, Texas was affirmed on November 1, 1978, on November 22, 1978 the appellant's motion for rehearing en banc was denied and on November 27, 1978 the mandate of this Court issued.

THEREFORE, WITH THE DENYING OF THE APPELLANT'S MOTION FOR REHEARING EN BANC this cause was disposed of by this Court on November 22, 1978,

the appellant having exhausted all remedies in this, The Court Of Criminal Appeals of Texas and the judgment has now become final on the docket of this Court.

WITNESS my hand and the seal of said Court, at my office in Austin, Texas this the 10th. day of January, A.D. 1979.

s/ Thomas Lowe

THOMAS LOWE, Clerk of the
COURT OF CRIMINAL APPEALS
OF TEXAS

[Seal]

THE STATE OF TEXAS

To: James Wardell, 813 Gigham, Enid, Oklahoma

Greeting:

You are commanded to appear by filing a written answer to the plaintiff's petition at or before 10 o'clock A. M. of the Monday next after the expiration of 20 days after the date of service hereof, before the Honorable 108th District Court of Potter County, Texas, at the Court House in Amarillo, Texas, to show cause why the judgment of forfeiture entered in this cause should not be made final. Said judgment of forfeiture was entered on the 20th day of December, 1978.

The file number of said case being No. 15921, 15922, 15923, 15924, 15925, 15926 Civil # 361

The style of the case is

THE STATE OF TEXAS Plaintiff

versus

JAMES WARDELL Defendant

A copy of the judgment of forfeiture accompanies this citation.

If this Citation is not served within 90 days after the date of its issuance, it shall be returned unserved.

Issued this the 9th day of January, A.D., 1979.

Given under my hand and seal of said Court, at office in Amarillo, Texas, this the 9th day of January, A.D., 1979.

Billie Nance Hill, Clerk
108th District Court,
Potter County, Texas

s/ By Linda Varlans, Deputy